

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MARIO P. TELLO,

Plaintiff,

vs.

BANK OF AMERICA N.A.; RECONTRUST
COMPANY N.A.; MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.; THE BANK
OF NEW YORK MELLON *formerly known as* THE
BANK OF NEW YORK, *as Trustee for* THE
CERTIFICATE HOLDERS OF CWALT, INC.
ALTERNATIVE LOAN TRUST 2005-51
MORTGAGE PASS-THROUGH CERTIFICATES
SERIES 2005-51,

Defendants.

Case No.: 2:12-cv-01040-GMN-NJK

ORDER

This action arises out of foreclosure proceedings initiated against the property of *pro se* Plaintiff Mario P. Tello, and is filed against Defendants Bank of America, N.A. (“Bank of America”); ReconTrust Company, N.A. (“ReconTrust”); Mortgage Electronic Registration Systems, Inc. (“MERS”); and The Bank of New York Mellon (“Bank of New York”) (collectively, “Defendants”). Before the Court is Defendants’ Motion to Dismiss (ECF No. 5). Plaintiff filed a Response (ECF No. 15) and Defendants filed a Reply (ECF No. 20).

I. BACKGROUND

Plaintiff originally filed this action in state court on May 29, 2012, and it was removed to this Court on June 19, 2012. (ECF No. 1.) Plaintiff requests declaratory and injunctive relief based on six causes of action: (1) negligent supervision; (2) common law fraud and injurious falsehood; (3) per se violations of Chapter 107 of the NRS; (4) per se conspiracy to defraud and ongoing fraudulent activity in violation of NRS 205.395; (5) slander of title; and (6) per se

1 violation of unfair and deceptive trade practices.

2 In his Complaint, Plaintiff refers to at least seventeen (17) exhibits that were purportedly
 3 attached to the Complaint; however, the Court has not been provided these exhibits in
 4 Defendants' Petition for Removal, the parties' Joint Status Report¹, nor in any corrected filing
 5 by Plaintiff. Accordingly, to the extent that the exhibits referred to by Plaintiff match in
 6 description the publicly recorded documents provided by Defendants, the Court refers to those
 7 documents as part of Plaintiff's Complaint (*see* Exs. 1-4, 6 to Mot. to Dismiss, corresponding to
 8 Plaintiff's referenced Exhibits 2, 6-8, 14). The remaining exhibits referenced by Plaintiff have
 9 not been produced to the Court in any form, including letters sent by certified mail (*see* Compl.,
 10 5:¶¶18, 20-23, 25-26, 6:¶27, referring to Exhibits 9-13, 15-17), the loan Note (*see* Compl.,
 11 4:¶10, referring to Exhibit 1), the Second Deed of Trust (*see* Compl., 4:¶12, referring to Exhibit
 12 3), and the August 22 and September 21, 2005 Substitution of Trustee documents (*see* Compl.,
 13 4:¶¶13-14, referring to Exhibits 4-5). Accordingly, to the extent necessary, the Court analyzes
 14 Plaintiff's allegations with regard to these exhibits solely based on his descriptions in the
 15 Complaint.

16 In 2005, Plaintiff executed a loan Note for \$292,000 and Deed of Trust on the property
 17 located at 945 Purdy Lodge Street, Las Vegas, 89138, APN#: 137-34-811-011 ("the property").
 18 (Compl., 4:¶¶9-11; Deed of Trust, Ex. 1 to Mot. to Dismiss.) The Deed of Trust names
 19 Mortgage IT as the Lender, Equity Title of Nevada as the Trustee, and MERS as the

21 ¹ Pursuant to the Court's June 19, 2012, Minute Order, the removing parties were required to file a Joint Status
 22 Report within thirty days which must:

23 Include as attachments copies of any pending motions, responses and replies thereto, and any
 24 prior court orders **or other matters requiring the court's attention which have not previously**
 25 **been filed and are not available on the federal docket for review by this court.** Please note
 that documents filed in the state case are not available to this court for review unless they are
 attached to the Petition for Removal, the Statement Regarding Removal, or re-filed in federal
 court.

(Order, June 19, 2012, ECF No. 3 (emphasis added).)

beneficiary solely as nominee for the Lender and Lender's successors and assigns. (Deed of Trust, Ex. 1 to Mot. to Dismiss.)

On August 17, 2009, Fidelity National Default Solutions recorded a Notice of Default as agent for ReconTrust, as agent for the Beneficiary, which was signed by Anselmo Pagkaliwangan for LSI Title Agency, Inc., as agent. (Compl., 4:¶15; Notice of Default, Ex. 2 to Mot. to Dismiss.) The Notice of Default states that ReconTrust "is the duly appointed Trustee" under the Deed of Trust, and does not name the beneficiary other than MERS. (Notice of Default, Ex. 2 to Mot. to Dismiss.)

On August 21, 2009, the beneficial interest in the Deed of Trust was transferred to Bank of New York in a "Corporation Assignment of Deed of Trust Nevada" ("Assignment") that was executed by "the undersigned" and signed by Angela Nava, "Assistant Secretary" under the signature block of MERS. (Compl., 4:¶16; Assignment, Ex. 3 to Mot. to Dismiss.)

On October 23, 2009, ReconTrust was named Trustee in a Substitution of Trustee executed by "the undersigned" as "the present Beneficiary" under the Deed of Trust, and signed by Angela Nava, "Assistant Secretary" under the signature block of:

THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS
TRUSTEE FOR THE CERTIFICATEHOLDERS OF CWALT, INC.
ALTERNATIVE LOAN TRUST 2005-51 MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2005-51 BY BAC HOME LOANS SERVICING, LP
FKA COUNTRYWIDE HOME LOANS SERVICING LP AS AIF.

(Compl., 5:¶17; Substitution of Trustee, Ex. 4 to Mot. to Dismiss; *see* Fig. 1 "Substitution of Trustee Signature".)

THE BANK OF NEW YORK MELLON FKA THE
BANK OF NEW YORK AS TRUSTEE FOR THE
CERTIFICATEHOLDERS OF CWALT, INC.
ALTERNATIVE LOAN TRUST 2005-51 MORTG
AGE PASS-THROUGH CERTIFICATES, SERIES
2005-51 BY BAC HOME LOANS SERVICING, LP
FKA COUNTRYWIDE HOME LOANS SERVICING
LP AS AIF
BY: Angela Nava
Angela Nava, Assistant Secretary

Figure 1. Substitution of Trustee Signature (Substitution of Trustee, Ex. 4 to Mot. to Dismiss.)

1 The Substitution of Trustee was dated September 10, 2009, and recorded on October 29, 2009.
2 (Substitution of Trustee, Ex. 4 to Mot. to Dismiss.)

3 On April 12, 2010, a Notice of Trustee's Sale was recorded by ReconTrust as Trustee.
4 (Compl., 5:¶24; Notice of Trustee's Sale, Ex. 6 to Mot. to Dismiss.) However, in their motion,
5 Defendants represent that "[t]he foreclosure sale has not gone forward to date" and Plaintiff
6 does not dispute this statement in his Response.

7 **II. LEGAL STANDARD**

8 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
9 that fails to state a claim upon which relief can be granted. *See North Star Int'l v. Ariz. Corp.*
10 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule
11 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not
12 give the defendant fair notice of a legally cognizable claim and the grounds on which it rests.
13 *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
14 complaint is sufficient to state a claim, the Court will take all material allegations as true and
15 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792
16 F.2d 896, 898 (9th Cir. 1986).

17 The Court, however, is not required to accept as true allegations that are merely
18 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
19 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
20 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a
21 violation is *plausible*, not just possible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing
22 *Twombly*, 550 U.S. at 555) (emphasis added).

23 A court may also dismiss a complaint pursuant to Federal Rule of Civil Procedure 41(b)
24 for failure to comply with Federal Rule of Civil Procedure 8(a). *Hearns v. San Bernardino*
25 *Police Dept.*, 530 F.3d 1124, 1129 (9th Cir.2008). Rule 8(a)(2) requires that a plaintiff's

1 complaint contain “a short and plain statement of the claim showing that the pleader is entitled
2 to relief.” Fed. R. Civ. P. 8(a)(2). “Prolix, confusing complaints” should be dismissed because
3 “they impose unfair burdens on litigants and judges.” *McHenry v. Renne*, 84 F.3d 1172, 1179
4 (9th Cir.1996). Mindful of the fact that the Supreme Court has “instructed the federal courts to
5 liberally construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d 1132,
6 1137 (9th Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of
7 leniency.

8 “Generally, a district court may not consider any material beyond the pleadings in ruling
9 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
10 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard*
11 *Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted). Similarly,
12 “documents whose contents are alleged in a complaint and whose authenticity no party
13 questions, but which are not physically attached to the pleading, may be considered in ruling on
14 a Rule 12(b)(6) motion to dismiss” without converting the motion to dismiss into a motion for
15 summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Under Federal Rule
16 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
17 *Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court considers
18 materials outside of the pleadings, the motion to dismiss is converted into a motion for
19 summary judgment. *See* Fed. R. Civ. P. 12(d); *Arpin v. Santa Clara Valley Transp. Agency*, 261
20 F.3d 912, 925 (9th Cir. 2001).

21 If the court grants a motion to dismiss, it must then decide whether to grant leave to
22 amend. Pursuant to Rule 15(a), the court should “freely” give leave to amend “when justice so
23 requires,” and in the absence of a reason such as “undue delay, bad faith or dilatory motive on
24 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed,
25 undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the

1 amendment, etc.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is
 2 only denied when it is clear that the deficiencies of the complaint cannot be cured by
 3 amendment. *See DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

4 **III. DISCUSSION**

5 Here, the Court finds adequate basis to dismiss Plaintiff’s Complaint pursuant to Rule
 6 8(a)(2) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, but will dismiss the
 7 Complaint without prejudice, particularly in light of the fact that Plaintiff may be able to cure
 8 the deficiencies in his Complaint by attachment of the missing exhibits, or by further factual
 9 support. To the extent that Defendants request dismissal of the Complaint pursuant to Rule
 10 12(b)(5) of the Federal Rules of Civil Procedure, the Court finds that Defendants have failed to
 11 provide adequate basis for dismissal of the Complaint on these grounds, and will deny the
 12 request without prejudice, with leave to re-file as a separate motion consistent with the briefing
 13 requirements of the United States District Court for the District of Nevada.

14 **A. Plaintiff’s allegations**

15 In his first cause of action for negligent supervision, Plaintiff describes the violations
 16 solely as “Defendant’s employees and/or agents’ actions, as alleged previously.” (Compl.,
 17 25:¶166.)

18 In his second cause of action for common law fraud and injurious falsehood, he
 19 describes the violations as misrepresentations in the “publicly filed false mortgage
 20 assignments,” and describes no other misrepresentations or violations. (Compl., 26:¶173.)

21 In his third cause of action for *Per se* Violations of Chapter 107, Nevada’s foreclosure
 22 statute, Plaintiff assails the Notice of Default by alleging that it “does not strictly comply with
 23 NRS 107.080” in that it:

- 24 (1) “does not adequately describe the deficiency,” pursuant to section 107.080(3)(a);
- 25 (2) “does not state the correct period to cure the deficiency” pursuant to section

1 107.080(2)(b);

2 (3) does not comply with section 107.080(2)(b) and (3) “because Recontrust was not
3 registered in the State of Nevada when it recorded the [Notice of Default]”;

4 (4) does not comply with section 107.080 generally “because Pagkaliwangan did not
5 have the authority to act on behalf of RECONTUST [sic] and he lacks personal
6 knowledge as to what he claims to attest to in the [Notice of Default];

7 (5) does not “comply with the requirement that the only entity entitled to foreclose is the
8 Lender or a transferee of the Note or the beneficiary who hold the right to collect the
9 funds under the Note or the beneficiary or trustee designated by the Note Holder.”

10 (Compl., 27-28:¶183.) Plaintiff also alleges that “the Note does not meet the conditions
11 necessary to enforce due to the fact that it lacks the proper endorsements and was not even
12 presented in a timely manner during the foreclosure process.” (Compl., 28:¶184.)

13 In his fourth cause of action for *Per se* conspiracy to defraud and ongoing fraudulent
14 activity in violation of Nev. Rev. Stat. § 205.395, Plaintiff alleges conspiracy to commit fraud
15 relating to the publicly recorded foreclosure documents. (Compl., 28:¶¶189-191.)

16 In his fifth cause of action Plaintiff alleges slander of title relating to Defendants’
17 purported authority to execute the Notice of Default, Notice of Trustee’s Sale, the Assignment,
18 and the Substitution of Trustee. (Compl., 29:¶196.) Plaintiff also alleges that Bank of New
19 York has no claim for enforcement of the Note or Deed of Trust. (Compl., 30:¶200.) Plaintiff
20 does not specify how Defendants’ alleged false assertions of authority disparaged title to his
21 property, and does not allege that he was not in default.

22 In his sixth cause of action Plaintiff alleges *Per se* violation of unfair and deceptive trade
23 practices pursuant to Nevada’s deceptive trade practices statutes, Chapters 598 and 589A,
24 where Defendants “knowingly misrepresented the legal rights, obligations or remedies of the
25 Plaintiff in his transactions with the true Note Holder by acting as if they had a valid interest in

1 the NOTE and [Deed of Trust] thereby intentionally violating NRS 598.092.” (Compl.,
2 31:¶213, 32:¶218.)

3 **B. Analysis**

4 Plaintiff’s Complaint is primarily deficient in that it alleges insufficient factual basis to
5 support any of his causes of action. Even where the Court may take judicial notice of the
6 publicly recorded foreclosure documents, the Court nevertheless finds no factual basis to
7 support Plaintiff’s allegations that Defendants violated Chapter 107 of the Nevada Revised
8 Statutes or foreclosed improperly pursuant to Nevada’s foreclosure statute. The Court agrees
9 with Defendants that Plaintiff’s allegation that “the debt has been discharged in full” because of
10 securitization (Compl., 15:¶115) has no basis in law or fact, and that this allegation does not
11 support any of Plaintiff’s causes of action. Furthermore, as discussed below, Plaintiff’s causes
12 of action sounding in fraud fail to satisfy the required pleading standards to plead with
13 specificity, and will be dismissed with leave to amend.

14 Importantly, Plaintiff concedes in his Complaint that his loan went into default. (Compl.,
15 10:¶65.) He alleges that “[t]here is no evidence of transfer of ownership from the original
16 lender to the Defendant” (Compl., 13:¶99), but also refers to the Assignment that transferred
17 the beneficial interest to Bank of New York (Compl., 4:¶16). The foreclosure documents
18 described above, and in Plaintiff’s Complaint demonstrate an apparent compliance with
19 Nevada’s foreclosure statutes, and Plaintiff provides no specific basis on which the Court
20 should find otherwise.

21 To state a claim for fraud or intentional misrepresentation, a plaintiff must allege three
22 factors: (1) a false representation by the defendant that is made with either knowledge or belief
23 that it is false or without sufficient foundation; (2) an intent to induce another’s reliance; and
24 (3) damages that result from this reliance. *See Nelson v. Heer*, 163 P.3d 420, 426 (Nev. 2007).
25 A claim of “fraud or mistake” must be alleged “with particularity.” Fed. R. Civ. P. 9(b). A

1 complaint alleging fraud or mistake must include allegations of the time, place, and specific
2 content of the alleged false representations and the identities of the parties involved. *See Swartz*
3 *v. KPMG LLP*, 476 F.3d 756, 764 (9th Cir. 2007). Rule 9(b) does not allow a complaint to
4 merely lump multiple defendants together but requires plaintiffs to differentiate their
5 allegations when suing more than one defendant and inform each defendant separately of the
6 allegations surrounding his alleged participation in the fraud.” *Id.* Plaintiff’s allegations
7 sounding in fraud, discussed above, fail to comply with the requirements to plead with
8 specificity.

9 As to Plaintiff’s sixth cause of action, courts have recognized that the Deceptive Trade
10 Practices Act does not apply to real property transactions, but to the sale of goods and services.
11 *See Reyna v. Wells Fargo Bank, N.A.*, No. 2:10-cv-01730-KJD-RJJ, 2011 WL 2690087, *9 (D.
12 Nev. July 11, 2011) (“N.R.S. § 598 . . . applies only to goods and services and not to real estate
13 loan transactions”); *Alexander v. Aurora Loan Servs.*, No. 2:09-cv-1790-KJD-LRL, 2010 WL
14 2773796, *2 (D. Nev. July 8, 2010) (“Plaintiff’s claim deals with the sale or lease of real
15 property, not goods or services; therefore [N.R.S. § 598] does not provide an avenue of relief to
16 [p]laintiff.”); *Parker v. Greenpoint Mortg. Funding*, No. 3:11-cv-00039-ECR-RAM (D. Nev.
17 July 15, 2011) (N.R.S. § 598 “does not cover a mortgage foreclosure”).

18 For these reasons, discussed above and in Defendants’ motion, the Court will dismiss
19 Plaintiff’s Complaint without prejudice, with leave to re-file if he can cure the identified
20 deficiencies.


21 **IV. CONCLUSION**

22 **IT IS HEREBY ORDERED** that the Motion to Dismiss (ECF No. 5) is **GRANTED**.
23 Plaintiff’s Complaint is dismissed without prejudice, with leave to re-file an amended
24 Complaint by **Monday, April 22, 2013**, curing the deficiencies identified in this Order. Failure
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1 to do so by this deadline will result in dismissal of this action with prejudice.

2 **DATED** this 29th day of March, 2013.

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Gloria M. Navarro
United States District Judge